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Supreme Court of the United States

October Term, 1973

No. 73-1512

BALDO M. KRISTOVICH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District.

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IN THE

Supreme Court of the United States

October Term, 1973
No. .....

BALDO M. KRISTOVICH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District.

Baldo M. Kristovich respectfully petitions this Court for a Writ of Certiorari to review the final judgment of the Court of Appeal of the State of California, Fourth Appellate District, affirming his conviction on two counts of perjury.

Opinion Below.

The opinion of the Court of Appeal is unreported; it is reprinted herein as Appendix A.

Jurisdiction.

The judgment of the Court of Appeal was entered on December 6, 1973, and is set forth herein as Appendix B.

A timely Petition for Rehearing was denied by that court on January 7, 1974. The order of denial is set forth herein as Appendix C.

A timely Petition for Hearing in the Supreme Court of the State of California was denied by that court on January 31, 1974. This order of denial is set forth herein as Appendix D.

Jurisdiction of this Court herein is invoked pursuant to 28 U.S.C. § 1257(3).

Question Presented for Review.

In a state-court jury trial for perjury, where the offense is defined as wilfully false testimony under oath as to any material matter, may the court, consistent with the Fourteenth Amendment's guarantee of jury trial, instruct the jury that the alleged false testimony "was material as a matter of law"?

Constitutional and Statutory Provisions Involved.

1. United States Constitution, Amendment 6:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

2. United States Constitution, Amendment 14, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

3. California Penal Code, Section 118, West's Annotated California Codes, Volume 47, Page 230 (1970):

> "Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may be

administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which such testimony, declarations, depositions, or certification is permitted by law under penalty of perjury and wilfully states as true any material matter which he knows to be false, is guilty of perjury."

Statement of the Case.

In 1969-70 petitioner, the Public Administrator of Los Angeles County (*see* California Probate Code §§ 1140 *et seq.*), sold two automobiles from estates under his administration to his brother, and one such auto to an auctioneer who served estates administered by the Public Administrator's office. The sales were at market value and were not illegal, but they did appear to violate office policies petitioner had instituted for his employees, forbidding them from selling estate property to relatives and business associates. To maintain employee morale, therefore, petitioner reported the three sales within his office under "fictitious" names: thus, for example, the sales to his brother were listed as having been made to "Mary Brady," which was the maiden name of petitioner's sister-in-law. The Los Angeles County Counsel's office thereafter prepared petitions for confirmation of these sales by the Los Angeles County Superior Court (probate department). The petitions, which included the "fictitious" names supplied by petitioner to his subordinates, were then signed by a Deputy of petitioner, "under penalty of perjury," in accordance with California law authorizing this form of oath. (California Code of Civil Procedure

§2015.5.) Upon these petitions the sales were approved by the probate court.

Based upon the petitions that he had neither prepared nor signed, petitioner was charged with two counts of perjury, in violation of California Penal Code § 118.[1] At trial, petitioner contested whether the "falsehoods" involving the purchasers' names were material matter. The petitions had been submitted pursuant to California Probate Code § 770, which provides that the administrator is chargeable with the actual value of depreciating property sold unless the court approves the sale post facto, "upon a sworn return." Petitioner urged that since the only issue in the confirmation proceedings was whether the sales had been for "actual value," the purchasers' names were not material. In support of this claim, petitioner adduced testimony of a probate court Commissioner—and voluminous documentary evidence—that the Los Angeles probate court routinely approved petitions under section 770 where the purchaser's name was listed as "various," or not even listed at all.

The trial judge, however, ruled that the names were material, and instructed the jury that they "were material as a matter of law." In conferences regarding settlement of the instructions, petitioner excepted to this instruction, as depriving him of his right of jury trial on all elements of the offense guaranteed by the

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[1]Petitioner was also charged and convicted on this basis of two counts of preparing false documentary evidence, California Penal Code § 134. That judgment was reversed by the Court of Appeal and remanded for redetermination of petitioner's motion for new trial, which has since been granted. The judgment of conviction of perjury here sought to be reviewed is absolutely final, and petitioner was separately sentenced to probation and fine on the perjury counts.

Fourteenth Amendment. After the jury found him guilty, petitioner moved for a new trial, again citing as error the constitutional infirmity of the materiality instruction. The motion was denied, and petitioner was sentenced to five years' probation and a $2,000 fine. On appeal to the Court of Appeal, petitioner again urged that California's rule leaving determination of materiality to the judge denied him his Fourteenth Amendment right to jury trial. The Court of Appeal affirmed, holding that this issue was governed by decisions of the California Supreme Court, and that any change in the law would have to come from that court. Petitioner petitioned for hearing by the Supreme Court on these grounds, but his petition was summarily denied.

Reasons for Granting the Writ.

The courts below applied California's rule, established by *People v. Lem You*, 97 Cal. 224, 228-29, 32 P. 11, 12 (1893), that in a perjury trial the court decides whether the element of materiality has been established, and instructs the jury on it "as a matter of law." This withdrawal from the jury in petitioner's case of a contested and "essential elemen[t] of the offense"[2] deprived petitioner of his constitutionally guaranteed right to a trial by jury.

The right of jury trial established by the Sixth Amendment is, of course, applicable to state-court defendants like petitioner, pursuant to the Fourteenth Amendment's due process guarantee. *Duncan v. Louisiana*, 391 U.S. 145 (1968). The essence of the right is the interposition of a body of peers not only between the

[2]*People v. Dunstan*, 59 Cal.App. 574, 576, 211 P. 813 (1922).

accused and the state but also as a buffer from the possible caprice of the trial judge. *Apodaca v. Oregon*, 406 U.S. 404, 410 (1972); *accord, id.* at 373 & nn. 10, 11 (Powell, J., concurring). Accordingly, the constitutional provisions involved indispensably contemplate determination of all elements of an offense by the jury, not the judge; and an instruction by the judge that an element of the offense is present "as a matter of law" violates the constitutional guarantees. *E.g., Brooks v. United States*, 240 F.2d 905, 906 (5th Cir. 1957); *see, e.g., United States v. Lee*, 483 F.2d 959, 960 (5th Cir. 1973); *United States v. Manuszak*, 234 F.2d 421, 424-25 (3d Cir. 1956).

These fundamental principles are well exemplified by *Brooks v. United States, supra*, a perjury case. The trial court had there charged the jury, " 'as a matter of law'," that the officer before whom the oath was taken was legally empowered at the time of the offense. On appeal, this instruction was held to be reversible error, "for the all-sufficient reason that it deprived the jury of its function . . . as exclusive judges of the facts . . . and thus violated appellants' constitutional right to a trial by jury as guaranteed by the Sixth Amendment." 240 F.2d at 906.

The courts of California have similarly spoken from time to time, *e.g., People v. Shavers*, 269 Cal.App.2d 886, 888-89, 75 Cal.Rptr. 334, 335-36 (1969), but have postulated an exception to the Constitution's commands in perjury cases. California's historic rationale for treating perjury-materiality as a "matter of law" that the jury may not touch runs as follows. Materiality in the crime of perjury is a "question [that] is exactly the same" as the question of the materiality of

evidence objected to when offered in the course of a trial; the latter question is a "question of law," for the court not the jury; ergo, whether or not the false testimony of a perjury defendant was material is also to be decided by the court. *People v. Lem You, supra,* 97 Cal. at 228, 32 P. at 12. This reasoning is defective in all of its premises.

First, "materiality" means two different things on an objection to evidence and on a trial for perjury. As more than one court has noted, a greater probative tendency is connoted by the term "materiality" in the perjury context. *People v. Clemente,* 285 App. Div. 258, 261-62, 136 N.Y.S.2d 202, 205-06 (1954), *aff'd per curiam,* 309 N.Y. 890, 131 N.E.2d 294 (1955) (materiality for jury not court); *Weinstock v. United States,* 231 F.2d 699, 701 (D.C. Cir. 1956).[3]

Second, no matter which species of materiality is considered, its determination is not an abstract "question of law." Rather, it involves mixed application of a legal standard (*e.g.*, tendency to influence) in each case to a unique set of facts, namely the circumstances of the judicial proceeding in which the evidence is supposedly material. Thus, to call materiality in a ruling on evidence a question of "law" is merely to apply a label derived from the fact that the judge is the decision-maker. Realistically viewed, the deter-

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[3]The federal court's analysis is fully apposite here, since materiality under the California perjury statute has been construed as meaning virtually the same thing as the materiality concept in federal perjury law. *Compare People v. Pierce,* 66 Cal.2d 53, 61, 423 P.2d 969, 975, 56 Cal.Rptr. 817, 823 (1967) ("[t]he test is whether the statement could probably have influenced the outcome of the proceedings") *with, e.g., Blackmon v. United States,* 108 F.2d 572, 573 (5th Cir. 1940) ("materiality is determined by whether the false testimony was capable of influencing the tribunal on the issue before it").

mination of materiality required upon a trial for perjury is "essentially a factual matter. . . ." *United States v. Koonce*, 485 F.2d 374, 380 (8th Cir. 1973); *see id.* at 380-81.

Finally, importation into the rules for perjury trials of the verbal fiction that "[t]he question of the materiality of evidence, no matter when or how it may arise, is always one of law for the court, and not of fact for the jury,"[4] can only be done by neglecting to take into account the jury's constitutionally mandated role of decision in such a trial—a function quite different from ruling on objections to evidence. And this is intolerable. As the court put it in *Brooks v. United States, supra*, "[h]einous as the crime of perjury is under our law, it is entitled to no relaxation of the constitutional guaranty of the citizen in order to punish it." 240 F.2d at 906.

California's determination-of-materiality rule is thus a constitutional anomaly of the gravest order. As one court in another jurisdiction that follows this rule recently noted, "the trial of a judicial perjury case is the only instance known where . . . a trial judge in a criminal jury case can direct a verdict against the defendant even as to one element of an offense." *Wilson v. State*, 284 So.2d 24, 25 (Fla. App. 1973). The rule's unconstitutionality has been the subject of scholarly criticism, *see* Lillich, *The Element of Materiality in the Federal Crime of Perjury*, 35 Ind. L.J. 1, 9-14 (1959), but has never commanded the studied review

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[4]*People v. Lem You, supra*, 97 Cal. at 228, 32 P. at 12.

of this Court. We submit that unless the issue is met, the Constitution's guarantee of jury trial will remain an empty promise for petitioner, and for other citizens who must defend a charge of perjury.

Conclusion.

For the reasons just stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH A. BALL,
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Attorneys for Petitioner.

APPENDIX A.

[Not for Publication in Official Reports]

Court of Appeal, Fourth District, Second Division, State of California.

People of the State of California, Plaintiff and Respondent, vs. Baldo M. Kristovich, Defendant and Appellant. 4 Crim. 5956 (Sup.Ct.A 278 052).

["FILED: Dec. 6, 1973."]

APPEAL from the Superior Court of Los Angeles County. William Caldecott, Judge. Affirmed in part; reversed in part.

Joseph A. Ball for Defendant and Appellant.

Evelle J. Younger, Attorney General; and James H. Kline and Lawrence F. Sherb II, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, the former Public Administrator of Los Angeles County, was convicted by a jury of two counts of perjury and two counts of preparing false evidence. He was found not guilty of four counts of embezzlement/grand theft and one count charging grand theft alone. The jury was unable to agree on the remaining 15 counts, charging conspiracy to commit conflict of interest, conflict of interest, perjury and preparing false evidence. These remaining counts were dismissed in the interest of justice.

The convictions arose from the sale of automobiles which were in the defendant's possession as a public administrator. They were sold as rapidly depreciating personal property under Probate Code, § 770. (See *Estate of Depew*, 65 Cal.App. 2d 81.) The sales were made to Marin Kristovich, defendant's brother, and George Barclay, an auctioneer who conducted sales of

estate property, but the sworn returns, prepared by his chief deputy at defendant's direction, showed the sales to have been made to "Mary Brady" and "Henry George." Defendant contended that the sales were for fair market value and that the names of the buyers were not material under contemporary probate court procedures in Los Angeles County.

Defendant's first contention is that the court committed error in its instructions re materiality on the perjury counts.

The court instructed, in substance, that if the jury found that the defendant caused his employees to declare under penalty of perjury that the automobiles were sold to names other than the actual purchasers that such statements were material as a matter of law.

Defendant urges this court to reconsider the current law to the effect that the question of materiality is not an issue of fact for the jury but is an issue of law for the court to determine. Our position in the judicial hierarchy being what it is, we are unable to accede to this suggestion because this is the law in this state by reason of decisions of the Supreme Court. (See *People v. Pierce,* 66 Cal. 2d 53; *People v. Lem You,* 97 Cal. 224.) Rather obviously, if the law in this respect is to be changed, that change must come from the Supreme Court and not from this court.

At oral argument counsel advised this court that he had certain reservations concerning this contention. We do not construe his remarks as an abandonment of the contention and we wish to make clear that he has preserved the issue for presentation to the Supreme Court.

Defendant does argue that a contested issue of fact was withdrawn from the jury by the court's instruction

on materiality. The court's duty in a perjury case is to instruct the jury as to what facts would show material testimony. (*People v. Lem You, supra,* at p. 228.) When the materiality of testimony depends on the existence of certain facts, and these facts are controverted, their existence must be determined by the jury. (*People v. Chadwick,* 4 Cal.App. 63, 67.) Defendant claims that the probate court's interest in or indifference to the names listed as purchasers on returns of sale under Probate Code, § 770, was such a controverted fact, and the jury was prevented from determining it by the court's instruction that if the jury found defendant had caused the falsification of names, the statements were material. There was evidence that before defendant's indictment, the probate court routinely approved sales in which no names of purchasers were given—the space was either left blank or contained the word "various."

The test for materiality is whether the statement could probably affect the probate court's approval of the sales. The actual belief or opinion of the judge in the original proceedings is not controlling. (*People v. Pierce, supra,* 66 Cal. 2d 53, 61.) Where the purchaser is a relative or associate of the administrator, the court would probably conduct a more detailed inquiry into the sale to insure full value was received than would be necessary if it appeared the transaction was made at arm's length. Defendant was acquitted of the grand theft counts based on these two sales, but the sale price of the two cars was low enough to convince the grand jury to indict him for that offense in connection with them. So if the probate court knew who the real purchasers were, it might not have approved the sales—it was at least arguable that the sales price was too low.

The testimony that the probate court often approved returns which did not list names was contradicted only in a limited sense—Mr. Dana, the supervising probate attorney for the superior court, testified that "various" had generally been approved only when long lists of items were sold at auction, and that since defendant's indictment, names were always required. The superior court sometimes did approve returns of sale which did not list the names of the purchasers;[1] this was uncontradicted. But this is simply evidence that the false statements did not actually affect the proceedings. Given this fact, the trial judge nevertheless found the misrepresentation of the purchasers' names *could* have affected the probate court's approval of the sales, and this is the proper test. The materiality of the false listing of names does not depend on the existence of controverted facts—the facts favorable to defendant were essentially uncontroverted. Defendant was not denied the right to have the jury determine all the factual issues.

Nor was the materiality instruction equivalent to a directed verdict of guilt. The instruction told the jurors that statements described in five perjury counts were material, yet the jurors reached agreement on only two of those counts. The jurors were instructed on all the elements of perjury, and obviously some were convinced that every element was present in two instances, but were not convinced beyond a reasonable doubt in the other three. The instruction was on the existence of only one element of the crime; it was not, and the jury did not treat it as, a direction to find defendant guilty of perjury.

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[1]Here the names of purchasers were falsely listed. There is no evidence that the court ever approved returns where a purchaser's name was falsified if the falsification was called to its attention.

Whether or not the defendant felt in his own mind that the facts he was causing his deputy to declare to be true under penalty of perjury were not material is of no relevance, since it is no defense that he did not know the materiality of the false statement. (*People v. McRae*, 256 Cal.App. 2d 95, 119.) The defendant would inject a new element into a perjury case, i.e., that the defendant not only knew that the statement was false but also that he intended to make a false statement as to a material fact. Materiality is not to be determined in the mind of the defendant.

Defendant's second contention is that the trial court applied the wrong standard in its ruling on his motion for a new trial of his conviction of preparing false evidence.

On his motion for new trial, the defendant attacked the perjury verdicts only on the materiality issue. On the other counts he argued insufficiency of the evidence.

In his discussion on this issue, the judge made some puzzling statements.

He first stated that if he had been trying the case without a jury he would have acquitted the defendant because he had a reasonable doubt as to a "fraudulent or deceitful purpose" in the defendant's mind. He then correctly stated that his determination was to be whether there was sufficient credible evidence for the jury to have reached the determination it did. He stated that there was "adequate evidence" for the jury to make its determination and that if he had a "grave question as to the propriety of their ruling," he would have set the verdict aside. So far, so good.

Then in a further colloquy with counsel, the court stated:

> "With regard to the evidence on the preparing false evidence charge, were I trying the case without a jury, I would have had a reasonable doubt, and would have acquitted. I think there was sufficient credible evidence that 12 people could have reached the verdict that they did, and that *I am not permitted by law to impose any judgment on them;* and for that reason alone, I deny the motion for a new trial." [Emphasis added.]

Further colloquy ensued which was as follows:

> "MR. BALL: If you had to reweigh the evidence—
>
> "THE COURT: If I were weighing it myself alone, I would say I had a reasonable doubt.
>
> "MR. BALL: As to whether or not it was fraudulent or deceitful?
>
> "THE COURT: That is correct.
>
> "MR. BALL: *At this time you believe you are unable to reweigh the evidence?* [Emphasis added.]
>
> "THE COURT: *That is correct,* and I want to make it perfectly clear in the record so if the appellate court wants to think about what the rule is and what to rule on, it's there for them to do.
>
> ". . . I am putting it squarely to them." [Emphasis added.]

The expression "and that I am not permitted by law to impose my judgment on them" and the judge's statement that he was unable to reweigh the evidence makes it necessary that this matter be remanded to the trial court for the sole purpose of a new hearing

on the defendant's motion for a new trial on the two counts of preparing false evidence at which the court is to exercise its proper function and reweigh the evidence. Contrary to one of the judge's comments, a new trial may be granted even though the evidence is sufficient for conviction "from the standpoint of the appellate court." An appellate court may not reweigh the evidence; the trial court must do so on a motion for new trial. (*People v. Creswell*, 119 Cal.App. 2d 584, 586.)

The standard for the trial judge on a motion for new trial is not difficult. It is his function to see that the task of the jury to find the facts is intelligently and justly performed and to determine whether there is sufficient credible evidence to sustain the verdict. The verdict of the jury is not to be ignored and a new trial granted simply because the judge might have reached another result had the case been tried without a jury. However, the defendant is entitled to two separate decisions, one by the jury and one by the judge, each weighing the evidence and each exercising an independent judgment. (*People v. Robarge*, 41 Cal. 2d 628, 633.) This, the trial court declined to do in the instant case.

The judgments on the perjury counts are affirmed. The judgments on the counts of preparing false evidence are reversed for the sole purpose of a remand for a rehearing on the defendant's motion for new trial on these counts.

/s/ Gardner, *P. J.*

We concur:

/s/ Tamura, *J.*

/s/ Gabbert, *J.*

APPENDIX B

In the Court of Appeal, Fourth Appellate District, State of California Division Two 4 Crim. No. 5956.

People, Plaintiff and Respondent vs. Baldo M. Kristovich, Defendant and Appellant.

On Appeal from the Superior Court in and for the County of Los Angeles. S.C. No. A 278 052.

The above-entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

IT IS ORDERED, ADJUDGED, AND DECREED *by the Court that the*

Judgment(s)

of the Superior Court in and for the County of LOS ANGELES *in the above-entitled cause, be and the same* are *hereby* AFFIRMED in part and REVERSED in part as follows: The judgments on the perjury counts are affirmed. The judgments on the counts of preparing false evidence are reversed for the sole purpose of a remand for a rehearing on the defendant's motion for new trial on these counts.

APPENDIX C.

Court of Appeal—State of California, Fourth Appellate District, Division Two.

People, Respondent, vs. Baldo M. Kristovich, Appellant. 4 Crim. No. 5956, County No. A-278052.

["FILED Jan. 7, 1974"]

BY THE COURT:

The Petition for Rehearing is DENIED.

Gardner, *P. J.*

APPENDIX D.

[Supreme Court of California]

"San Francisco, January 31, 1974.

(4 Crim 5956, Div 2)—*People v. Kristovich.* Clark, J., did not participate. Appellant's petition for hearing denied."

SUPREME COURT, U. S.
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BALDO M. KRSTOVICH,
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Respondent.

Response in Opposition to Petition for Writ of Certiorari

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Respondent.

Response in Opposition to Petition for Writ of Certiorari

Opinion Below

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Two was certified for nonpublication. A copy of this opinion is attached as Appendix A to the Petition for Writ of Certiorari herein.

Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to Title 28, United States Code section 1257(3).

Question Presented

In a state court jury trial for perjury, may the court instruct the jury that the alleged false testimony was material as a matter of law consistent with the Sixth Amendment's guarantee of the right to a jury trial under the due process clause of the Fourteenth Amendment?

Statement of the Case[1]

Petitioner was indicted by the Grand Jury of Los Angeles County on 25 felony counts involving the offenses of conspiracy to commit the crime of conflict of interest, California Penal Code sections 1090, 1097, and 182.1, perjury in violation of California Penal Code sections 118 and 118a, preparing false evidence in violation of California Penal Code section 134, and other violations not germane to the instant petition. The indictment was found to be a true bill. [Cl. Tr. p. 49.]

Prior to trial, petitioner's motion under California Penal Code section 995 was granted as to four counts and denied as to the remaining counts. Petitioner's motion under California Penal Code section 1538.5 (suppression of evidence) was denied. Prior to the jury's deliberations, petitioner's motion under section 1118.1, California Penal Code, for judgment of acquittal, as to certain counts was denied and granted as to two counts. Petitioner's motion for judgment of acquittal (dismissal) as to one count was also granted and denied as to another count. [Cl. Tr. pp. 56-57, 65, 94, 106-07.]

After a jury trial, petitioner was found not guilty as to five counts and guilty as charged as to four counts in the indictment, namely, violation of section 134, California Penal Code, preparing false evidence, and violation of sections 118 and 118a, California Penal Code, perjury. [Cl. Tr. pp. 258-68.]

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[1]It is assumed by respondent that petitioner has lodged a copy of the record on appeal with the Court, or is prepared to do so on request; the bracketed references will be to the Clerk's Transcript and Reporter's Transcript on appeal.

Petitioner's motion for a new trial on the perjury counts was denied, as was his motion for a new trial as to the preparing false evidence counts. Criminal proceedings were suspended, petitioner was granted probation for a period of five years, without formal supervision, and the remaining counts were dismissed in the interests of justice. As to one perjury count, petitioner was granted summary probation for a period of five years on condition he pay a fine of $2,000. [Cl. Tr. pp. 269, 283-88.]

Upon appeal, petitioner's conviction for perjury was affirmed by the California Court of Appeal and his conviction for preparing false evidence was reversed and remanded to the trial court for reconsideration of the motion for a new trial as to those two counts only. (Petn., Appendix A, p. 7.)

Petitioner's petitions for rehearing (Court of Appeal) and hearing (California Supreme Court) were denied as to the perjury counts, and those counts are now final as to the state courts. Petitioner's motion for a new trial as to the two preparing false evidence counts was eventually granted by the trial court judge upon remand.

Statement of Facts

Petitioner was the Public Administrator/Public Guardian of Los Angeles County, having been appointed to that position in 1960. Petitioner was a fiduciary to the estates administered by the Office of the Public Administrator/Public Guardian of Los Angeles County and was responsible for the sale of assets of those estates in various types of proceedings, including sales at auction and sales by private sales with a solicitation of bids. The Public Administrator was also al-

lowed, under California Probate Code section 770, to sell certain types of depreciating assets or property without notice, but such sales had to be approved by the probate court before title passed and fair market value had to be received for the assets sold. Public auctions were conducted by an auctioneer with competitive bidding, and the highest bidder took the property and title passed. Private bidding contemplated the solicitation of bids by prospective purchasers, with the highest bid being accepted, and then the court would confirm the sale after a "return and petition for confirmation of sale." Title to that property would not pass until the matter came up before the court and the court examined the return and petition, which was verified under penalty of perjury, and was satisfied that the sale was conducted pursuant to the statute. The Office of County Counsel of the County of Los Angeles would prepare the return and petitions for approval of sale under section 770. This type of sale related almost invariably to the sales of automobiles. In the auction of personal property under section 772, the County Counsel's office did not prepare those documents, which were prepared by the Public Administrator, and the matter would be set for a hearing on the court's calendar and required notice would be given. [Rep. Tr. pp. 53-54, 55-62, 1099-1117, 1118-30.]

As to Counts VIII and IX of the indictment,[2] the evidence showed that one George Harry Barclay was an independent contract auctioneer and sometime in the 1960s became an auctioneer for the Public Administrator of Los Angeles County. From late 1968

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[2]Only one count of each transaction herein described involved a perjury conviction.

to 1971 Mr. Barclay held auctions for the Public Administrator at least every other month. In March of 1970 Mr. Barclay purchased an automobile from the Public Administrator which was a 1969 Cadillac. He negotiated for the purchase of this vehicle initially with petitioner's secretary, Lynn Reka. The vehicle had approximately 12,000 miles on it. Mr. Barclay communicated with petitioner on the telephone and indicated he desired to purchase the vehicle. Petitioner quoted a price of $4,800 and Mr. Barclay thereafter bought the vehicle for that price. There was no written bid of any kind on the car. Mr. Barclay took possession of the car from an impound lot and not from the Public Administrator's warehouse where he performed his auctions. This vehicle was purchased from the estate of Raymond C. Warren, as indicated by People's Exhibit 8B, a lettergram from petitioner dated March 17, 1970. This lettergram recited that the 1969 Cadillac from the estate of Raymond Warren had been sold to "Henry George" at an address of "6312 Teasdale, North Hollywood." Mr. Barclay did not live on Teasdale in March of 1970 but lived in the San Fernando Valley. Mr. Barclay further did not tell petitioner to process the sale of that car under the name of "Henry George."

The Return of Sale and Petition for Order Approving Sale of Personal Property under California Probate Code section 770 stated that the vehicle had been sold on March 12, 1970, and described the vehicle which Mr. Barclay purchased. The document further recited that the vehicle had been sold to "Henry George, 6312 Teasdale, North Hollywood, California." Mr. Barclay did not instruct anyone in the Public Administrator's office or anyone in the County Counsel's

office to submit the document to the court indicating that the Cadillac had been sold to a "Henry George" living at that address. [Rep. Tr. pp. 1200-19.]

Mr. Barclay was aware at the time he purchased the vehicle that the California Government Code prohibited certain individuals from buying property from an estate, and Mr. Barclay did not buy at his own auctions because he took it for granted that he could not buy at an auction which he conducted. [Rep. Tr. pp. 1208-09.]

As to Counts X and XI of the indictment, the evidence showed that petitioner sold two vehicles, a 1969 Chevrolet and a 1963 Plymouth, from the estates of Lucile R. Rogers and Harriett T. Elkins, respectively, to his brother, Marin T. Kristovich. As to the 1963 Plymouth, petitioner's brother offered $477 and petitioner accepted this offer. The 1963 Plymouth was registered in the name of Mary Florine Kristovich, the wife of petitioner's brother. However, People's Exhibit 6A, a lettergram dated July 8, 1969, referring to the Plymouth, stated that the vehicle had been sold to a "Mary Brady" at 5537 Verdun, Los Angeles, by petitioner. Mary Brady was the maiden name of petitioner's brother's wife. The lettergram was in petitioner's handwriting. People's Exhibit 6D, a Return of Sale and Petition for Order Approving Sale of Personal Property, stated that the vehicle had been sold to a "Mary Brady" at that address. Petitioner discussed the sale of this vehicle with a person in the property

division of his office and told them to put the sale in the name of "Mary Brady" because his brother did not want it to go in his name. Petitioner's brother also purchased a 1969 Chevrolet for himself. According to People's Exhibit 7A, a lettergram from petitioner to Mr. Lyle Peck, attention Art Eaton, dated July 9, 1969, petitioner stated he had sold the 1969 Chevrolet for $2,177, again to "Mary Brady" at 5537 Verdun Avenue, Los Angeles. The document was in petitioner's handwriting. People's Exhibit 7C, the Return of Sale and Petition for Order Approving Sale of Personal Property, listed the same automobile and recited that petitioner had sold the vehicle on July 25, 1969, without notice, to a "Mary Brady" at that address for $2,-177 in cash. Again, petitioner's brother testified he did not specifically request that the second vehicle be purchased in the name of "Mary Brady" as opposed to his name. [Rep. Tr. pp. 1269-93.]

There was further extensive evidence showing that the documents submitted to the probate court as to the sales of the vehicles under California Probate Code section 770 came solely from the information supplied by petitioner through the lettergrams sent to various individuals in petitioner's office. These individuals had no authority to change the information contained thereon. The actual returns of sale and Petitions for Orders Approving the Sale of Personal Property in the case at bar were signed by the Chief Deputy Public Administrator/Public Guardian, Harry P. Koulos, on

petitioner's behalf as Public Administrator. [Rep. Tr. pp. 1046-47, 1057-59, 1060-61, 1209-11, 1284-85, 1288-89, 3734.]

Petitioner acknowledged at trial by his testimony that the sale of the vehicle to Mr. Barclay, the contract auctioneer, was contrary to his own policy expressed in a letter signed by him, because at that time Mr. Barclay was an auctioneer who was used by the Public Administrator in connection with the sales in particular estates. Petitioner testified he did not wish his employees to feel that the Public Administrator was doing something he had told his employees not to do, and that is why he returned the sale in the name of Henry George rather than George Barclay. As to the sales of vehicles to his brother, petitioner testified that in his opinion he could legally sell cars to his brother as the Public Administrator but since the office had a policy of no sales to relatives, petitioner felt that his employees should not know that he himself was selling vehicles to his relatives. He did not wish them to know that "the boss does things that he won't let us do." [Rep. Tr. pp. 2904-91.]

ARGUMENT

Petitioner Was Not Denied His Right to a Jury Trial Under the Sixth and Fourteenth Amendments When the Trial Court Ruled Under California Law That Petitioner's Statements Under Oath Were Material as a Matter of Law as to the Names of Purchasers of Vehicles Sold by Petitioner as Public Administrator

Petitioner's sole contention is that the California rule regarding materiality of statements made under oath as being a question of law for the trial court to determine and not the jury violated petitioner's right to a jury trial under the Sixth and Fourteenth Amendments, United States Constitution. Petitioner acknowledges that the California rule is well settled that it is for the court to determine as a matter of law whether or not a particular statement was material, *i.e.*, whether it could have influenced the outcome of the proceedings in which it was made. But petitioner asserts that this rule is incorrect because it is a "verbal fiction" and further states it is a "constitutional anomaly of the gravest order." (Petn. pp. 5-9.)

It is respectfully submitted by respondent that petitioner's argument lacks any merit. As petitioner himself has conceded, and as the California Court of Appeal specifically held in its opinion below, it is the law of the State of California by reason of decisions of the California Supreme Court that the question of materiality of any statement or testimony under oath is not an issue of fact for the jury but is an issue of

law for the court to determine and that it is the exclusive right of the trial judge in a criminal action in California to determine the materiality of the alleged perjured testimony or statement and to instruct the jury thereon as to the materiality of the statement or testimony as a matter of law. *People v. Pierce,* 66 Cal. 2d 53, 61, 423 P.2d 969; *People v. Lem You,* 97 Cal. 224, 228-29, 32 Pac. 11; *People v. Sagehorn,* 140 Cal. App. 2d 138, 152-53, 294 P.2d 1062; *People v. Kriton,* 73 Cal. App. 2d 184, 190, 166 P.2d 45; *People v. Brophy,* 49 Cal. App. 2d 15, 24, 120 P.2d 946; *People v. Macken,* 32 Cal. App. 2d 31, 41, 89 P.2d 173.

Petitioner was not denied the right to a jury trial as to the two perjury counts by reason of such a rule. The test for materiality under the facts at bench is whether the statement as to names of purchasers could probably have affected the probate court's approval of the sales of automobiles in the instant case. The actual belief or opinion of the judge in the original proceedings is not controlling. *People v. Pierce, supra,* 66 Cal. 2d at 61, 423 P.2d at 975. As the California Court of Appeal pointed out, petitioner claimed that the probate court's interest in or indifference to the names listed as purchasers on returns of sale under California Probate Code section 770 was a controverted fact, and petitioner argued the jury was prevented from determining it by the court's instructions that if the jury found petitioner had caused the falsification of names, the statements were material. As the California Court of Appeal held, if the probate court had known who the real purchasers of those vehicles were, it might well not have approved the sales, might well have further inquired as to the propriety of said sales, and it

was arguable that the sales prices were too low (under fair market value). (Petn., Appendix A, p. 3.) The materiality of the false names of the purchasers did not depend upon the existence of controverted facts. Essentially, the facts favorable to petitioner were uncontroverted. The true test is whether or not the misrepresentation of the purchasers' names *could* have affected the court's approval of the sale. It is submitted that this is the proper test and petitioner was not thereby denied a jury trial on the question of his guilt or innocence of the charge of perjury.

Further the materiality instruction was not equivalent to a directed verdict of guilt. The instruction told the jurors that statements described in five perjury counts were material, yet the jurors reached agreement, as pointed out by the California Court of Appeal in its opinion, in only two of those counts (the instant case). The jurors were therefore not convinced beyond a reasonable doubt in at least three other counts that petitioner had in fact caused a false material statement to be made knowing it to be false or without knowing the truth or falsity of the statement. The instruction was on the existence of only one element of the crime of perjury, it was not, and the jury did not so treat the instruction, as a direction to find petitioner guilty of perjury regardless of any other fact presented to the jury.

Respondent further argues that states may properly determine the substantive law within their own jurisdictions on such crimes as perjury or preparing false evidence, or any crimes involving statements under oath to a court of law or submission of evidence in a judicial proceeding. The jury in the instant case deter-

mined that petitioner was guilty of two counts of perjury by causing to be prepared and returned to a probate court returns for confirmation of sales of vehicles with false names listed as the purchasers of said vehicles. At best, petitioner's reasons for doing so were specious. It would appear the real reason petitioner did so was to mask the true identities of the purchasers, namely, his brother and an independent contract auctioneer who had business dealings with petitioner's office, so that the authorities and the probate court would not realize what petitioner was doing. Petitioner's argument that the aforementioned California rule deprived him of a jury trial ignores the fact that he was not convicted of several other similiar charges of perjury involving the same jury instructions. The perjury of which petitioner was found guilty was clear in the two instant counts, and the test for materiality was properly applied by the trial court under California law, namely, whether the misrepresentation as to the names of purchasers of estate assets could have affected the outcome of the proceedings in probate court. As pointed out by the California Court of Appeal, there was no evidence showing that the probate court ever routinely approved sales of vehicles from decedents' estates where the names of purchasers were listed completely falsely, if such falsification was called to the court's attention. (Petn., Appendix A, p. 4.)

Also, a jury under California law still must decide as an issue of fact solely for its determination whether or not the defendant, in fact, caused to be made or personally made the false statement under oath. This was required of the jury in the instant case, and petitioner does not dispute it. Therefore, the instruction as to the element of materiality did not withdraw from

the jury the ultimate determination of whether petitioner had in fact made or caused to be made the false material statements under oath. Petitioner's argument in the courts below, both at trial and on appeal, was to the effect that he had merely had his name upon documents which had actually been signed by his chief deputy. This was rejected by both the trial court jury and the appellate courts of California. Petitioner, as the Public Administrator/Public Guardian of Los Angeles County, was solely responsible legally for the returns filed with the probate court bearing his name, and containing information which he himself submitted to his various agents to include in such documents presented to the probate court as to the sales of the particular vehicles involved herein.

Respondent takes issue with petitioner's argument that the California rationale for materiality as a matter of law in a perjury case is "defective in all of its premises." (Petn. p. 7.) The proposition of law can be fairly boiled down to the following: A statement is "material" within the meaning of evidentiary rules when it has a direct bearing on some issue before the trier of fact. When evidence is objected to on the grounds of materiality, a court determines whether or not the evidence shall be heard by the trier of fact, whether it is the court or a jury. When the issue is one of "materiality" of a statement or testimony under oath by the defendant in a perjury case, the question is likewise one of law since it involves wholly legal concepts and not factual determinations by a jury as to whether the defendant did or did not cause the statement to be made knowing it to be false. Therefore, it is entirely reasonable that California courts have taken the posi-

tion that such a question is a matter of law for the court to determine, and not a question of fact for the jury to determine, even though materiality is an element of the crime of perjury. *People v. Pierce, supra,* 66 Cal. 2d at 61, 423 P.2d at 975; *People v. Gamble,* 8 Cal. App. 3d 142, 146, 87 Cal. Rptr. 333. Thus, far from being "defective in all of its premises" such a rule is eminently rational, and, we submit legally correct. The question of "materiality" of a statement, whether it is sought to be introduced in evidence or whether it is part of the corpus of the offense of perjury, is primarily and fundamentally a legal question and not a factual one. Petitioner admits that other jurisdictions have the same rule in perjury cases, as well as California. *See Wilson v. State,* 284 S.2d 24, 25 (Fla. App. 1973). (Petn. p. 8.)

Respondent respectfully takes issue with petitioner in his reliance upon *Brooks v. United States,* 240 F.2d 905, 906 (5th Cir. 1957). (Petn. p. 6.) In that case the Circuit Court of Appeals reversed for the sole reason that the trial court had charged the jury as a matter of law that a particular agent for the Internal Revenue Service was authorized by law to administer oaths to individuals questioned by the IRS. This instruction did indeed withdraw from the jury's consideration a completely factual issue which was part of the elements of the offense charged against the defendants, namely, that they had given false testimony in a proceeding before the IRS in which the laws of the United States authorized an oath to be administered by a competent agent of the IRS. *Brooks v. United States, supra.* The trial court in that case erred not on the issue of materiality as an element of the offense of perjury under federal law, but rather erred in charging

the jury that a particular *fact* (the authority of a particular government agent to administer oaths) which was apparently disputed at trial was proved by the government as a matter of law. The instant case presents no such analogy, since the court did not instruct the jury, for instance, that petitioner as a matter of law had caused to be made or made the statements in question under oath to the probate court. This was still for the jury to determine, and the jury did not convict petitioner on several identical charges under the same instructions. As the court in *Brooks* said:

> "[I]t [the instruction] deprived the jury of its function of determining whether or not, under the evidence and as exclusive judges of the facts and of the credibility of the witnesses, they believed beyond a reasonable doubt that Perry was an officer authorized to administer . . . and thus violated appellants' constitutional right to a trial by jury. . . ." *Brooks v. United States, supra,* 240 F.2d at 906.

It is submitted that the issue in *Brooks* was factual and not legal, as is the question of materiality under California law in a perjury prosecution.

The issue of materiality was adversely determined to petitioner in the trial court below, as well as on appeal in the California Court of Appeal and Supreme Court. Petitioner has presented no persuasive reasoning or authority to show why this Court should overturn the rule as to a state substantive offense which has been in existence in California for well over seventy years. It is submitted respectfully that petitioner was not denied any right to a jury trial under the Sixth or Fourteenth Amendments. *See Duncan v. Louisiana,*

391 U.S. 145, 149-50 (1968). The question of whether or not a particular statement could have influenced a court of law in a particular proceeding and was, therefore, material is peculiarly one of law and not of fact and, therefore, the trial court properly resolved this issue rather than the jury and so instructed. No violation of petitioner's constitutional rights to a jury determination has been shown on the ultimate issue of guilt or innocence or the issue of whether or not petitioner did in fact make the statements or caused them to be made to the probate court. California may properly set forth such rules for substantive crimes as perjury under the Penal Code, since each state is allowed to determine what shall be the elements of a particular state offense and how they are to be proven by the prosecution, so long as such rules satisfy the basic requirements of due process of law. As long as the reasonable doubt standard is utilized and the jury is not improperly directed by the court to find the defendant guilty in some manner or other, no federal constitutional rights of defendants are thereby violated merely because one of the elements of the offense may be legal and not factual, and therefore for the trial court and not the jury to pass upon. Perjury is such a crime. and California has uniformly held that the question of materiality is legal, not factual. This Court in *Rochin v. California,* 342 U.S. 165 (1952), stated with regard to this question:

> "In our federal system the administration of criminal justice is predominantly committed to the care of the States. The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers. [Citation.] Broadly speaking,

crimes in the United States are what the laws of the individual States make them, subject to the limitations of Art. I, § 10, cl. 1, in the original Constitution, prohibiting bills of attainder and *ex post facto* laws, and of the Thirteenth and Fourteenth Amendments.

"These limitations, in the main, concern not restrictions upon the powers of the States to define crime, except in the restricted area where federal authority has preempted the field, but restrictions upon the manner in which the States may enforce their penal codes. Accordingly, in reviewing a State criminal conviction under a claim of right guaranteed by the Due Process Clause of the Fourteenth Amendment, from which is derived the most far-reaching and most frequent federal basis of challenging State criminal justice, 'we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes.' [Citation.] Due process of law, 'itself a historical process,' [citation], is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice." *Rochin v. California, supra,* at 168.

Therefore, in reviewing petitioner's criminal convictions for two counts of perjury, the scope of scrutiny under the Due Process Clause of the Fourteenth Amendment, particularly as it applies to the Sixth Amendment's guarantee of a jury trial, should be

"very narrow." Under such a constitutional test, respondent submits that petitioner has presented no substantial issue of federal constitutional law.

Conclusion

For the foregoing reasons, respondent requests denial of the Petition for Writ of Certiorari.

Respectfully submitted,

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